

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARY L. HUFF**

## Claimant

VS.

STATE OF KANSAS

Respondent

AND

## STATE SELF-INSURANCE FUND

Insurance Fund

Docket No. 1,032,230

## ORDER

Respondent and its insurance fund appealed the February 11, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on June 21, 2013, in Wichita, Kansas.

## APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. E. L. Lee Kinch of Wichita, Kansas, appeared for respondent and its insurance fund (respondent).

## RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed that following her accident, claimant returned to work for respondent from July 9, 2009, through March 1, 2010. The parties also stipulated temporary total disability benefits were paid at the rate of \$302.95 per week for 15.57 weeks, totaling \$4,716.95. Further, the parties stipulated that if the Board awards claimant permanent partial disability based upon claimant having a work disability as requested by respondent, or awards claimant benefits for being permanently and totally disabled, all disability payments are due and owing.

## ISSUES

This is a claim for a May 30, 2005, accident. ALJ Clark found claimant was permanently and totally disabled.

Respondent alleges claimant failed to give timely notice of her accident, as claimant did not notify her supervisor until August 13, 2005. In its submission brief, respondent admits claimant suffered a right knee accidental injury, but denies claimant sustained a back injury arising out of and in the course of her employment. If the Board finds claimant sustained a back injury that resulted in a permanent functional impairment, respondent asserts claimant sustained a 24% whole person functional impairment. Respondent contends claimant has failed to prove she is permanently and totally disabled. If the Board finds claimant is not permanently and totally disabled, but is entitled to a work disability, respondent argues claimant has a 100% wage loss and a 15% task loss for a 57.5% work disability.

Claimant maintains she notified her training instructor of the accident and that the training instructor was her supervisor. Claimant contends that based upon a preponderance of the evidence, she sustained right knee and low back injuries and is entitled to an award of permanent total disability benefits. However, if the Board finds claimant is not permanently and totally disabled, but is entitled to a work disability, claimant argues she has a 100% wage loss and a 49.5% task loss for a 74.75% work disability.

The issues before the Board on this appeal are:

1. Did claimant give timely notice of her accident to respondent?
2. Did claimant sustain a low back injury by accident arising out of and in the course of her employment with respondent?
3. What is claimant's functional impairment?
4. Is claimant permanently and totally disabled?
5. If not, what is claimant's work disability?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

On May 30, 2005, claimant injured her right knee while engaged in riot training. Claimant testified that she felt a pop in the right knee and immediately reported the injury to her instructor, whose last name was Morris. According to claimant, she was told by Officer Morris to continue training. At the regular hearing, claimant testified that during training, she had no supervisor, as she was in training. In August 2005, claimant sought medical treatment for the right knee injury from Dr. Terry Morris, her family doctor. She also complained to Dr. Morris of the onset of right hip and low back pain. On August 13,

2005, claimant reported right knee, right hip and low back injuries to her duty sergeant, Sergeant Mongolis, who had claimant complete an accident report.

Eventually, claimant underwent three right knee surgeries: an arthroscopic knee surgery by Dr. Pat D. Do on January 20, 2006; a second arthroscopic knee surgery by Dr. Kenneth Jansson on April 24, 2007; and a right knee replacement by Dr. Paul C. Pappademos in April 2009. In July 2009, claimant returned to work for respondent until March 2010, when she could no longer pass the physical required to be a correctional officer. At the regular hearing, claimant testified the right knee still swells and it burns. On a scale of one to ten with ten being the worst, claimant's pain is an eight or nine on her worst day.

At the regular hearing, claimant testified that two weeks after she injured her knee, she noticed right hip pain when climbing stairs. On cross-examination, claimant testified the right hip pain began one to two days after she injured the right knee. She indicated the low back pain began two to three weeks after the right knee injury, but became more severe after her right knee replacement. Claimant could not pinpoint one event that caused her back pain. According to claimant, she had no problems with her low back and received no medical treatment for back pain prior to May 30, 2005, but did receive chiropractic treatment while in high school in 1965. Claimant testified the chiropractic treatment was mostly for her shoulders.

Claimant testified that of the jobs she performed in the 15 years prior to her injury, she possibly could still perform the duties of a desk clerk as long as she could get up from her chair and move around every 45 minutes to an hour. She indicated that sitting in a chair longer than 45 minutes to an hour bothers her lower right back/hip area. Claimant testified that because of her knee she can only stand or walk 25 to 30 minutes before feeling she needs to sit down.

#### Dr. Pat D. Do

On January 20, 2006, Dr. Do performed an arthroscopy with partial medial and lateral meniscectomy and chondroplasty of the patella on claimant's right knee. Dr. Do indicated claimant reached maximum medical improvement on August 8, 2006, and in accordance with the *Guides*,<sup>1</sup> opined that claimant had a 15% functional impairment to the right lower extremity. He assigned claimant no permanent restrictions. When he was deposed, Dr. Do was unaware claimant had undergone two additional right knee surgeries and had reviewed no medical records of any other health care provider except those contained in Exhibit 2 of his deposition. Dr. Do agreed that under the *Guides*, a patient

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

who has a knee replacement is given a lower extremity functional impairment of 37% for a good result, 50% for a fair result and 75% for a poor result.

On August 3, 2006, claimant reported having an antalgic gait and complained of pain running up her back and down her leg to Dr. Do. Dr. Do also indicated that physical therapy notes stated that when claimant walked, pain went up and down her back and leg. However, the last time Dr. Do saw claimant, on August 29, 2006, she did not complain of back pain. On redirect examination, Dr. Do testified that claimant made no back complaints and he did not note evidence of an antalgic gait. He then explained that his August 3, 2006, note did not contain a serious back complaint. Dr. Do testified that it was not unusual for a person who had a significant antalgic gait for a significant period of time to develop complaints of back pain, but he did not know if such a person would develop a structural change. Dr. Do confirmed that he had never physically examined claimant's hip or back.

Dr. Paul C. Pappademos

Dr. Pappademos first saw claimant for a right knee injury on March 19, 2008, and performed a right knee replacement on April 14, 2009. When Dr. Pappademos saw claimant on April 30, 2009, she had developed low back pain, which Dr. Pappademos began treating. After seeing claimant on January 6, 2010, Dr. Pappademos recommended a lumbar spine MRI to rule out a lumbar cause for claimant's complaint of increased right knee and radiating right leg pain. The MRI report indicated there was a disc protrusion on the left side at T10-11 and increased signal at the anterior and superior aspects of L1 that the radiologist described as degenerative disease and not an acute injury.

In a letter to respondent's attorney dated May 11, 2010, it was Dr. Pappademos' opinion that claimant's right knee pathology was not directly related to her low back degenerative disease. On June 17, 2010, Dr. Pappademos opined claimant had a 37% right lower extremity functional impairment that was based upon the *Guides* and that she was at maximum medical improvement. Dr. Pappademos continued providing claimant follow-up treatment and last saw her on October 27, 2011, which also was the day Dr. Pappademos was deposed. During the follow-up visits, claimant continued complaining of right knee pain, and after ordering and reviewing the results of a venous Doppler study and a bone scan, Dr. Pappademos was "tapped out on deciding what was causing her pain."<sup>2</sup> However, he did not disbelieve claimant was having right knee pain.

When Dr. Pappademos saw claimant on April 6, 2011, he told claimant she could perform a sit-down job and gave her restrictions of no prolonged standing, walking or sitting and no kneeling, crawling, jogging, jumping or running. He also indicated it was reasonable for claimant to use a cane. Dr. Pappademos testified claimant could perform her previous

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<sup>2</sup> Pappademos Depo. at 26.

jobs as a computer support specialist and desk clerk if she were allowed to alternate sitting and standing. On August 26, 2011, Dr. Pappademos, because of claimant's subjective pain complaints, altered his opinion on functional impairment to a 50% right lower extremity functional impairment.

Dr. Pappademos agreed with claimant's attorney that an antalgic gait can cause low back pain. However, Dr. Pappademos testified that he had not formulated an opinion on whether or not claimant had a permanent impairment of her lumbar spine and would defer to a neurosurgeon or spine surgeon.

Dr. Pedro A. Murati

At the request of her attorney, claimant was evaluated by Dr. Murati on April 26, 2010, and March 16, 2011. Dr. Murati testified that when he saw claimant on April 26, 2010, she complained of right knee, hip and low back pain. Dr. Murati assigned claimant functional impairments of 50% for the right knee and 7% for the right trochanteric bursitis for a 54% right lower extremity functional impairment that converts to a 22% whole body impairment. He also placed claimant into DRE Lumbosacral Category III for a 10% whole body impairment. Dr. Murati opined the foregoing functional impairments combine for a 30% whole body impairment. He provided claimant with significant restrictions and opined she was essentially and realistically unemployable.

Dr. Murati's final diagnosis of claimant on March 16, 2011, was status post right knee replacement, low back sprain due to antalgia, bilateral SI joint dysfunction due to antalgia and right trochanteric bursitis due to antalgia. It was acknowledged by Dr. Murati that his report from that visit stated, "[T]he claimant states she does not notice any back pain or numbness or tingling, at this time."<sup>3</sup> He assigned claimant functional impairments of 75% for the right knee and 7% for the right trochanteric bursitis for a 77% right lower extremity functional impairment that converts to a 31% whole body impairment. He also placed claimant into DRE Lumbosacral Category II for a 5% whole body impairment. Dr. Murati opined the foregoing functional impairments combine for a 34% whole body impairment. He again provided claimant with significant restrictions and opined she was essentially and realistically unemployable.

Dr. Murati testified that if a fact finder determined claimant was essentially and realistically employable, she sustained a task loss of 49.5%, based upon the job task analysis of Jerry D. Hardin. On cross-examination, Dr. Murati acknowledged the first mention in the medical records of low back complaints by claimant was when she complained to Dr. Pappademos, approximately four years after claimant's right knee injury.

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<sup>3</sup> Murati Depo. (May 4, 2011) at 34 and Ex. 4 at 2.

When Dr. Murati examined claimant and initially testified on May 4, 2011, he did not have the reports of Drs. Morris, Do, Jansson or Stein. Dr. Murati's deposition was continued to December 14, 2011, after he reviewed records from Susan B. Allen Memorial Hospital and Drs. Zarnow, Do, Morris, Stein and Pappademos. Dr. Murati testified those records were supportive of his opinions.

Dr. Paul S. Stein

At the request of respondent, claimant was evaluated by Dr. Stein on June 15, 2010. According to Dr. Stein, claimant reported injuring her right knee on or about May 30, 2005, and had mild pain in the right side of her lower back and hip ever since the original injury. Dr. Stein reviewed a January 25, 2010, lumbar MRI scan that revealed degenerative change at L3-4 and L4-5 with a lesser degree at L5-S1. The MRI also showed darkening of the disc at L2-3 and a mild disc bulge at that level and some bulging on the left at L5-S1. Dr. Stein opined that claimant had a right knee injury that ultimately required a total knee replacement and preexisting, but essentially asymptomatic lumbar degenerative disc disease that was aggravated. In Dr. Stein's opinion, there was a causal connection between claimant's May 2005 accident and her right knee and low back injuries.

Dr. Stein opined claimant had a 50% functional impairment to the right lower extremity and was in DRE Lumbosacral Category II for a 5% whole body functional impairment. The two functional impairments combined for a 24% whole body functional impairment. Dr. Stein imposed restrictions of avoiding repetitive stair climbing; walking on uneven surfaces; repetitive crawling, kneeling and squatting; running; heavy lifting; and repetitive bending and twisting. Based upon the task analysis of vocational expert Steve L. Benjamin, Dr. Stein opined claimant could no longer perform 13 of 85 nonduplicative tasks for a 15% task loss. He testified claimant could perform her past jobs as a computer support specialist, desk clerk and dispatcher. In a report sent to claimant's and respondent's attorneys dated July 22, 2010, Dr. Stein stated:

Based upon the restrictions that I provided for this patient having a "fair result" from her total knee arthroplasty as well as complaints regarding the lower back and right hip, I cannot state that she is unemployable. Based upon my restrictions, I believe that the patient would be able to work if such is available within those restrictions. Whether or not such work is available, I cannot state. However, I note that my restrictions are considerably less than those of Dr. Murati.<sup>4</sup>

Dr. Jeanette C. Salone

Dr. Salone, a physical medicine and rehabilitation specialist, was claimant's authorized treating physician beginning August 23, 2011, and saw claimant four times for

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<sup>4</sup> Stein Depo., Ex. 3.

chronic right knee pain. After the first visit, Dr. Salone felt that within a reasonable degree of medical certainty claimant was “qualified for a sedentary work level.”<sup>5</sup> Dr. Salone prescribed Percocet and Gabapentin. Dr. Salone testified she last saw claimant on April 11, 2012, and felt claimant was qualified for a job that required mostly sitting. According to Dr. Salone, claimant had an antalgic gait, meaning she struggles to walk. She also described claimant’s gait as “wobbly,” or off balance, not stable.<sup>6</sup> According to Dr. Salone, claimant frequently used a cane to ambulate. Dr. Salone testified that claimant is realistically not able to be employed, but is not totally disabled. Dr. Salone indicated that because of claimant’s age and her ability to get around in an office setting, she would not be able to find a job.

On cross-examination, Dr. Salone admitted that on January 5, 2012, she felt claimant could perform light work with no prolonged standing or walking; change positions after sitting for 20 minutes; no running, jumping, crawling or kneeling; lifting no more than 20 pounds, but only on an occasional basis; and frequent lifting and/or carrying objects weighing no more than 10 pounds. Dr. Salone indicated claimant could work, if she could find a job that accommodated those restrictions.

Steve L. Benjamin

Respondent employed Mr. Benjamin, a vocational rehabilitation consultant, to perform an analysis of claimant’s task and wage losses. He testified that claimant held 28 jobs with 27 different employers and performed 85 nonduplicative job tasks in the 15 years prior to her accident. Mr. Benjamin indicated claimant graduated from high school in 1965, had a cosmetology license from 1966 until sometime in the 1980s, attended Wichita Therapeutic School of Massage and held several certifications through that institution and had a journeyman’s license in carpentry.

Taking into consideration the restrictions placed upon claimant by Dr. Stein, Mr. Benjamin opined claimant could no longer perform 31 of 85 nonduplicative tasks for a 36.5% task loss and that she could return to the open labor market and was not permanently and totally disabled. Utilizing Dr. Stein’s restrictions, Mr. Benjamin opined claimant could return to work and earn \$396.24 per week.

According to Mr. Benjamin, if Dr. Pappademos’ restrictions were utilized, claimant could return to the open labor market and was not permanently and totally disabled. Mr. Benjamin testified that if claimant were limited to sedentary work, as inferred by Dr. Pappademos, claimant would be looking at entry-level wages of \$290 per week.

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<sup>5</sup> Salone Depo. at 8.

<sup>6</sup> *Id.* at 23.

Mr. Benjamin acknowledged that claimant's extensive tattoos might limit her employment prospects. He also testified:

Q. (Mr. Riedmiller) Considering her [claimant's] age and the labor market, her education, her prior experience, what you can say is that there are jobs that she could possibly qualify and get, but that's the extent of your opinion, true?

A. (Mr. Benjamin) Correct.<sup>7</sup>

Jerry D. Hardin

Mr. Hardin, a personnel consultant, performed a task capacity evaluation at the request of claimant's attorney. Mr. Hardin testified that based upon the restrictions imposed by Dr. Murati, claimant is essentially and realistically unemployable and is unable to obtain or perform substantial, gainful employment. Mr. Hardin also testified that claimant is essentially and realistically unemployable if one takes into consideration: (1) the restrictions placed upon claimant by Dr. Murati; (2) claimant can only occasionally stand and sit and has to alternate those positions; (3) claimant's education, training, experience and her work-related injuries; and (4) claimant uses a cane 50% of the time.

Mr. Hardin opined that utilizing Dr. Stein's restrictions, there would be some jobs in the open labor market that claimant could perform. However, it was the opinion of Mr. Hardin that in the labor market in Wichita, Kansas, claimant would be essentially and realistically unemployable because the economy and the job market in Wichita, Kansas, was not as robust as in the open labor market. He also testified that claimant is essentially and realistically unemployable if the following are considered: (1) Dr. Stein's restrictions; (2) claimant can only occasionally stand and sit and has to alternate those positions; (3) claimant's education, training, experience and her work-related injuries; and (4) claimant uses a cane 50% of the time. Mr. Hardin also indicated that if claimant was under Dr. Stein's restrictions, she would be competing against others with no restrictions, which would make her the last job applicant to be hired.

After reviewing the deposition transcripts of Mr. Benjamin and Drs. Pappademos, Salone, Murati and Stein and the exhibits thereto, Mr. Hardin was deposed a second time. He opined after reviewing the testimony of Drs. Salone, Murati and Stein that claimant is essentially and realistically unemployable. Mr. Hardin could not render an opinion as to whether claimant was essentially and realistically employable based upon Dr. Pappademos' testimony, as the doctor was concerned with only claimant's right knee and hip injuries and not her low back injury. In Mr. Hardin's opinion, because of claimant's need to take breaks and her problems with sitting and standing more than occasionally, no

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<sup>7</sup> Benjamin Depo. at 31.



employer would employ claimant at the jobs that Mr. Benjamin said claimant could still perform.

In his Award, the ALJ cited the fact that Dr. Stein opined claimant had a 24% whole body functional impairment and that Dr. Pappademos opined claimant had a 50% right leg functional impairment. However, the ALJ never made a specific finding as to claimant's functional impairment. The ALJ inferred claimant had a whole body functional impairment by finding claimant was permanently and totally disabled. ALJ Clark stated:

At the time of this award, the Claimant is now 66 years old and receiving social security disability benefits, according to Dr. Salone's testimony. The Claimant has a high school education, and around 1995 and 1996, she completed a course at a massage school and received a cosmetology license also in 1996, but in the past 15 years prior to the injury that is subject to this litigation, she has not used either one of these certificates. The rest of her work has been physical labor, jobs which require constant or near constant standing. The Claimant has extremely severe and limiting restrictions placed upon her by the doctors involved, and is unable to physically go back and do any of her previous employments.

K.S.A. 44-510c(a)(2), reads:

*"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."*

This Court finds the opinions of Dr. Salone to be persuasive, and finds that the Claimant is permanently and totally disabled.<sup>8</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

1. Did claimant give timely notice of her accident to respondent?

K.S.A. 44-520 in pertinent part states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

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<sup>8</sup> ALJ Award at 6-7.

Claimant injured her right knee during training. She testified that she had no supervisor, but immediately notified her training instructor of the right knee popping during training. That testimony is uncontroverted. The Board finds this constitutes timely notice under K.S.A. 44-520, as the training instructor was supervising claimant at the time of her accident. In *Brown*,<sup>9</sup> Brown gave notice of his accident to his lead winder. Fabpro argued the lead winder was not Brown's supervisor. Brown's production manager testified that the lead winder was not a supervisor, but did direct work for three to five people. A Board Member found based upon the record that respondent was given timely notice of the accident. The Board finds the present claim is analogous to *Brown*.

2. Did claimant sustain a low back injury by accident arising out of and in the course of her employment with respondent?

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>10</sup> A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."<sup>11</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>12</sup>

Claimant testified her low back pain began two to three weeks after the right knee injury, but became more severe after her right knee replacement. Claimant testified she had no back issues and received no medical treatment for back pain prior to May 30, 2005. Drs. Stein and Murati opined there was a causal connection between claimant's May 2005 accident and her low back injury. No physician opined that claimant's low back injury was not work related. The Board finds that claimant proved by a preponderance of the evidence that she sustained right knee and low back injuries by accident arising out of and in the course of her employment with respondent.

3. What is claimant's functional impairment?

ALJ Clark did not determine claimant's functional impairment. Dr. Stein opined claimant had a 50% right lower extremity functional impairment and a 5% whole body impairment under DRE Lumbosacral Category II of the *Guides* which convert and combine for a 24% whole body impairment. Dr. Pappademos opined claimant had a 50% right

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<sup>9</sup> *Brown v. Fabpro Oriented Polymers, Inc.*, No. 253,707, 2000 WL 1277552 (Kan. WCAB Aug. 22, 2000).

<sup>10</sup> K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>11</sup> K.S.A. 44-501(a).

<sup>12</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

lower extremity functional impairment. Dr. Murati opined claimant had right lower extremity functional impairments of 7% for right trochanteric bursitis and 75% for the right knee, and a 5% whole body impairment under DRE Lumbosacral Category II, which convert and combine for a 34% whole body impairment. The Board finds the functional impairment ratings of Drs. Stein and Pappademos with respect to claimant's right knee to be more credible than that of Dr. Murati. Only Dr. Murati assigned claimant a functional impairment for right trochanteric bursitis and a 75% functional impairment for the right knee. Therefore, the Board finds claimant sustained a 24% whole body functional impairment.

4. Is claimant permanently and totally disabled?

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>13</sup>

In *Wardlow*,<sup>14</sup> Wardlow, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding Wardlow's condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether Wardlow was permanently totally disabled.

In the present claim, at the time of the regular hearing, claimant was nearly 63 years of age. Claimant has a high school education, received training as a cosmetologist and a massage therapist and holds a journeyman's license in carpentry. She was given permanent work restrictions by Drs. Stein, Salone, Pappademos and Murati, although

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<sup>13</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>14</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

those restrictions differed. Claimant was prescribed Percocet and Gabapentin by Dr. Salone. Claimant has an antalgic gait that Dr. Salone described as wobbly, or not stable, and uses a cane 50% of the time.

Dr. Stein opined claimant could perform past jobs as a computer support specialist, desk clerk and dispatcher. However, Dr. Stein could not state whether claimant could obtain work within the restrictions he imposed. Dr. Salone indicated claimant could perform sedentary work, but also indicated that because of claimant's age and her ability to get around in an office setting, she would not be able to find a job.

Mr. Hardin opined that claimant is essentially and realistically unemployable. Mr. Benjamin testified there were jobs for which claimant could possibly qualify and get, but that was the extent of his opinion. Taking into consideration claimant's age, work experience, education, the fact that she is taking Percocet and Gabapentin, claimant's significant right knee and back injuries and the permanent restrictions imposed upon her by Dr. Stein (whose permanent restrictions are less restrictive than those of Drs. Salone and Murati), the Board affirms ALJ Clark's finding that claimant is permanently and totally disabled.

### **CONCLUSION**

1. Claimant gave timely notice of her accident to respondent.
2. Claimant proved by a preponderance of the evidence that she sustained right knee and low back injuries by accident arising out of and in the course of her employment with respondent.
3. Claimant has a 24% whole body functional impairment.
4. Claimant met her burden of proof that she is permanently and totally disabled.
5. The issue of claimant's work disability is moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>15</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>15</sup> K.S.A. 2012 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, the Board affirms the February 11, 2013, Award entered by ALJ Clark, but makes the additional finding that claimant has a 24% whole body functional impairment.

The ALJ did not approve the fee agreement filed by claimant's counsel. The Board approves said contract.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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John D. Clark, Administrative Law Judge